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TABLE OF CASES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No._____

RAILWAY EXPRESS AGENCY, INC., *Petitioner*

vs.

GLYNN C. MALLORY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

PRELIMINARY

Your petitioner, Railway Express Agency, Inc., a corporation organized under the laws of the State of Deleware, and doing business in the State of Mississippi, respectfully prays that writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered May 28, 1948, by which said judgment said Circuit Court of Appeals affirmed judg-

ment theretofore rendered in the District Court of the United States, Western Division, of the Southern District of Mississippi, at Vicksburg, in favor of the respondent and against the petitioner, Railway Express Agency, Inc., defendant in said District Court.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED

Respondent filed the suit here involved against petitioner, Railway Express Agency, Inc., for Thirty-five Thousand Dollars ($35,000.00), for damages for personal injuries sustained by respondent while employed by petitioner as cashier in its express office in the City of Natchez, Mississippi.

The respondent alleged that his duties required him to open and close a safe, owned by petitioner, in order to place therein for shipment money and other valuables and to remove such articles from said safe when the same was received at the Natchez Office. He alleged that the safe weighed approximately three hundred and seventy-five pounds and was too heavy for one man to lift and that on account of a defect in the dial which opened said safe, it was necessary for him to raise the safe to a vertical position, and that on the occasion when he sustained his injuries at the direction and command of his superior he undertook to lift the safe and because of its weight he suffered a reuptured intervertebral disc, necessitating an operation and resulting, as he claims, in total and permanent disability.

The case was tried and submitted to the jury which returned a verdict for the plaintiff in the sum of Twenty-three Thousand, Five Hundred Dollars ($23,500.00). Prior to the submission of the case to the jury, the petitioner moved the Court for peremptory instruction to find for the defendant, which motion was overruled. After the ver-

dict of the jury was rendered, the petitioner filed its motion for judgment notwithstanding the verdict, and in the alternative moved the Court to grant it a new trial. The District Judge overruled both of said motions, and the case was duly appealed to the Circuit Court of Appeals, where on May 28, 1948, said judgment was affirmed, with one Judge dissenting. Record pages 222-234, inclusive.

In the District Court the case was tried on two issues: First, whether or not the dial of the safe which the respondent was required to operate, was out of order; and second, whether on account of defective dial the respondent was required to lift the safe from a horizontal to a vertical position in order to properly work the combination. The Court instructed the jury in these words:

> "So I instruct you now that if you believe the combination on the safe was working and that there was nothing wrong with it, that would end the lawsuit and he would not be entitled to recover, even though he might have been injured while trying to lift it. If the combination was working properly as it did in the Court room this morning, then there was not any need for him to have lifted it. If you believe that there has been no change in the combination and the safe is in the same condition today as it was on the 14th of February 1945, then your verdict would be for the defendant because his injuries would be due entirely to his own fault in not working the combination properly. The mere fact that the combination wouldn't work properly would be immaterial if he was not working the right combination, but if he was working the right combination and you should believe that it did not open and that its failure to open was due to a defect in it, then it would be necessary that you consider the case further on that point. But if, as I say, the combination was working alright, then he would not be entitled to recover." Record pages 202-203.

On the trial of the case the respondent was the only witness who testified in his own behalf as to the alleged defect in the safe, and he did not point out any defect nor give any particular description of any defect in the safe, resting upon his mere assertion that the safe was out of order and would not work.

To rebut the testimony of the respondent, petitioner introduced at least six witnesses, who testified that the safe could be opened while it was in a horizontal position when the combination was properly worked and that the safe and dial were not out of order or out of repair. And in addition thereto, the respondent caused to be made a demonstration before the jury that the safe could be and was opened while the same was in a horizontal position when the combination was properly worked on the dial, and the safe itself and the dial were exhibited to the jury. The undisputed, uncontradicted and positive testimony of the petitioner was that the safe was in the same condition on the date of the trial that it was on the date when the plaintiff (respondent here) alleged he had been injured, and that no repairs of any kind had been made to the safe or to the dial.

In the face of this undisputed testimony, the Court overruled motion for a directed verdict and also overruled motion for judgment notwithstanding the verdict, and for a new trial based on the ground that the verdict was against the overwhelming weight of the evidence. The Circuit Court of Appeals affirmed the judgment, giving force and effect to a mere probability and without regard to the overwhelming evidence on the part of the petitioner.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

It is respectfully submitted that the opinion of the Circuit Court of Appeals for the Fifth Circuit in this cause is in conflict with the holdings of the Supreme Court of

the State of Mississippi in similar causes wherein the Supreme Court of the State of Mississippi holds that the mere assertion by a witness that something was out of order or that the instrumentality furnished him by the master would not work, is not sufficient to afford a basis for a recovery against the master. See *Columbus and Greenville Railroad Co. v. Coleman,* 172 Miss. 514.

Said opinion of the Circuit Court of Appeals for the Fifth Circuit is likewise in conflict with prior decisions of that Court, to-wit, *Texas Co. v. Hood et al,* 161 Fed. 2d, 618. In that case the Court holds as follows:

> "Where two equally justifiable inferences may be drawn from the facts proven, one for and the other against the plaintiff, neither is proven, and the verdict must be against him who had the burden of proof."

And again in the same case the said Circuit Court of Appeals held:

> "Moreover, where the plaintiff's right of recovery depends upon the existence of a particular fact being inferred from proven facts, such inference is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses whose testimony is consistent with the facts actually proven, and which uncontradicted evidence shows affirmatively that the facts sought to be proved did not exist."

The opinion of the Circuit Court of Appeals is likewise in conflict with prior decisions of the Supreme Court of the United States, as in the case of *Pennsylvania R. Co. v. Chamberlain,* 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed. 819, wherein it is held:

> "And the desired inference is precluded for the further reason that respondent's right of recovery de-

pends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

The decision of the Circuit Court of Appeals recognizes that the verdict and judgment is erroneous but the majority of the Judges hold that there is no relief from such error, which holding, we respectfully submit, is erroneous.

The decision of the Circuit Court of Appeals in this cause is erroneous, in that it failed to pass upon the question as to whether the District Judge was in error in not considering and passing upon the motion for a new trial filed by petitioner herein.

Wherefore, a writ of certiorari is respectfully asked.

James L. Byrd,
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Harry S. Marx,
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New York 17, New York
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230 Park Avenue,
New York, New York
Counsel for Petitioner

Service of petition for certiorari, brief in support thereof and a copy of printed record is hereby acknowledged, this the_____day of July 1948.

_____

Counsel for Respondent

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No._____

RAILWAY EXPRESS AGENCY, INC., *Petitioner*

vs.

GLYNN C. MALLORY, *Respondent*

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the District Court of the United States for the Western Division of the Southern District of Mississippi is found at Record pages 214-215, inclusive. The opinion of the Circuit Court of Appeals for the ifth Circuit is in the Record, pages 222-233, inclusive (including the dissenting opinion). The decision that was rendered on May 28, 1948, has not yet been officially reported.

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

1. Section 240 (a) of the Judicial Code, U.S.C.A., Title 28, Section 347, defining the jurisdiction of the Supreme Court of the United States, provides that in any case in the Circuit Court of Appeals it shall be competent for the Supreme Court of the United States upon the petition of any party thereto to require by certiorari that the cause be certified to the Supreme Court. Subsection 8 (a) of said Section 240 provides that application for said writ may be filed within three months after the entry of judgment, and that for good cause said time may be extended not exceeding sixty days by a Justice of said Court.

2. The decision of the Circuit Court of Appeals and the judgment rendered thereon were entered on May 28, 1948. Record, page 234.

The record in this Court shows that the petition for writ of certiorari, supporting brief, and the record were filed in this Court within the statutory period of three months.

3. The nature of the case and the ruling of the Court below which are deemed to bring the case within the jurisdictional provisions relied on have been briefly set forth and stated in the petition for writ of certiorari and will be more fully hereinafter presented in this brief under the headings "Statement of Case" and "Argument."

4. The cases believed to sustain the jurisdiction of this Court have likewise been referred to in the petition for writ of certiorari and will be hereinafter referred to in this brief.

STATEMENT OF THE CASE

Respondent, Mallory, was employed as a cashier by petitioner in its office at Natchez, Mississippi, and had been so employed for about five years and his duties were to keep certain records and to attend to the shipment of and receipt of money and other articles of value which were shipped to and from Natchez, Mississippi. The money was replaced in an iron safe which was locked or opened by operation of a dial which operated to open the mechanism of the safe. The dial was removable and when the safe was in transit there was no dial in or on the safe. The safe weighed approximately 360 pounds, measuring 24 inches in length, 15 inches in width and 17 inches in height.

The respondent testified that the dial was out of order and on that account the safe could not be opened when it was in a horizontal position and that before he could open the safe it was necessary for him to raise it from a horizontal to a vertical position. He testified that the safe was out of order from the time he became cashier to the date when he says he received his injuries. He testified he complained to his superior over a long period of time that the safe was out of order and that many promises to repair the safe were made, but that no repairs were actually made. He testified that on the day he received his injuries he was in a hurry to put the money in the safe and that he undertook to lift the same in order to open it and place therein a shipment of money. Just what difference there was in the operation of the dial when the safe was in a vertical position and when it was in a horizontal position is not shown by the respondent's evidence, nor by any other evidence in the case.

No witness other than the plaintiff testified as to the safe being out of order and his testimony was, as has been stated, to the general effect that the safe was out of order, without any explanation or description of the operation of

the safe and without any description of any particular defect in the lock or dial.

Six witnesses testified for the defendant that they had had occasion to open the safe in question, with the dial in question, and that at no time was the safe out of order, and at no time was it necessary to raise the safe from a horizontal to a vertical position in order to open it, and the testimony is undisputed that the safe was not repaired from the time respondent says he was injured to the time of the trial. At the trial, in the presence of the jury several witnesses opened the safe by the operation of the dial while the safe was in a horizontal position, without any difficulty whatever. The positive, unimpeached testimony of these witnesses is that the safe was not out of order and the demonstration showed that it was not out of order. See the testimony of witnesses Laret (Record page 146), Uhlich (Record page 149), King (Record page 164), Riordan (Record page 169), McLaws (Record page 179).

The petitioner moved the Court for a peremptory instruction to the jury to find for it at the conclusion of the respondent's testimony, which motion was overruled. At the conclusion of all the testimony the motion was renewed and was overruled, the District Court stating as follows:

> "Gentlemen, at this time I will overrule that motion rather than take it on reservation since it makes no difference. I am rather of the opinion that that motion is well taken but I am going to permit the case to be argued to the jury since I want to give the jury the opportunity to have as much time as possible to consider it. Of course, under the rules if a verdict is returned for the plaintiff the defendant will have an opportunity then to renew its motion and brief it within ten days and I will hear arguments at that time * * * " Record page 201.

The District Court submitted the case to the jury under its charge on two propositions; first, whether the dial on the safe was working and was not out of order; and second, whether the respondent was caused to lift the safe because of its defective condition at a time when he did not have sufficient help and was injured because of lifting the safe. The Court's charge is found in Record, pages 202-207, inclusive.

The petitioner filed its motion for judgment notwithstanding the verdict and in the alternative prayed that the verdict and judgment entered thereon be set aside. See Record pages 210-212, inclusive. This motion was filed December 4, 1946, and on August 9, 1947, the District Judge overruled the motion and filed its opinion, the opinion being at Record pages 214-215, which opinion shows on its face that the District Judge did not pass upon the question raised by the petitioner in its motion for a new trial but merely limited his decision to passing upon the application for judgment notwithstanding the verdict. From the judgment of the District Court appeal was made to the United States Circuit Court of Appeals for the Fifth Circuit, and on May 28, 1948, that Court affirmed the judgment of the lower court; two of the Circuit Judges holding to affirm and one Circuit Judge dissenting. The opinions, one in chief and the dissenting, are found in Record, pages 222-233.

SPECIFICATION OF ERROR URGED

The decision of the Circuit Court of Appeals for the Fifth Circuit is in conflict with the holdings of the Supreme Court of the State of Mississippi in similar causes. See *Columbus & Greenville Railroad Co. v. Coleman*, 172 Miss. 514.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is in conflict with prior decisions of that Court, towit, *Texas Co. v. Hood et al*, 161 Fed. 2d. 618.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is in conflict with prior decisions of the Supreme Court of the United States, such as in the case of *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed. 819.

The Circuit Court of Appeals is in error in not holding that the District Judge was in error in overruling or failing to pass upon motion made by petitioner for a new trial. The decision of the Circuit Court of Appeals recognizes that the verdict and judgment is unconscionable and erroneous, but the majority of the Judges hold that there is no relief from such judgment.

It is respectfully submitted that the decision of the Circuit Court of Appeals for the Fifth Circuit is erroneous because the Court affirmed a judgment based upon inferences, contrary to the rule of law which obtains in the State of Mississippi, which rule of law is applicable in the instant case. The case is determinable by the laws of the State of Mississippi because it is a common law action brought in the District Court of the United States whose jurisdiction was invoked on the ground of diversity of citizenship, and under the rule laid down by this Honorable Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, the State law as construed by the Supreme Court of the State is the law which governs. However, the law with reference to the matter of inferences and the

weight to be given them is no different in the Federal Court than that of the State Court.

There are many cases in the reports of the Supreme Court of Mississippi holding that assertion of a witness involving an admixture of fact an opinion is inadequate to support the affirmative of the issue. Among cases cited are the following: *Columbus and Greenville Railroad Co. v. Coleman*, 172 Miss. 514; *Berryhill v. Nichols*, 171 Miss. 769; *New Orleans & N.E.R. Co. v. Holsomback*, 168 Miss. 493.

The latest case from the Supreme Court of the State of Mississippi upon this point is *Danciger Oil and Refining Co. v. Free*, 35 So. 2d 542 (not yet officially reported), which case was decided May 24, 1948. In this latest case the Court referred to the cases above cited and reiterates the holding of the Supreme Court, to the effect that "Courts in civil cases act upon reasonable probabilities. In trials under the common law to prove a possibility only or to leave the issue to surmise or conjecture is never sufficient to sustain a verdict."

The Court, in the case of *Pennsylvania Railroad Co., Petitioner, v. Margaret V. Chamberlain, Administrator*, 288 U.S. 33, 77 L. Ed. 819, says:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

To support this ruling, this Court cited a large number of authorities, both State and Federal.

The Circuit Court of Appeals for the Fifth Circuit in the case of *Texas Co. v. Hood, et al,* Fed. 2d. 618, says:

> "Where two equally justifiable inferences may be drawn from the facts proven, one for and the other against the plaintiff, neither is proven, and the verdict must be against him who had the burden of proof. Moreover, where the plaintiff's right of recovery depends upon the existence of a particular fact being inferred from proven facts, such inference is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses whose testimony is consistent with the facts actually proven, and which uncontradicted evidence shows affirmatively that the facts sought to be proved did not exist."

The Circuit Court of Appeals for the Fifth Circuit, in the case of *Texas Co. v. Hood, et al,* supra, quotes from the case of *Arnall Mills v. Smallwood,* 68 Fed. 2d 57, wherein the Court said:

> "Although the circumstances may support the inference of a fact, if it is shown by direct unimpeached, uncontradicted, and reasonable testimony which is consistent with the circumstances that the fact does not exist, no lawful finding can be made of its existence. *Pennsylvania R. Co. v. Chamberlain,* 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed. 819. *Winn v. Consolidated Coach Corporation,* 6 Cir., 65 Fed. 2d 256, citing cases."

The authorities above cited are clear to the effect that where the testimony of a witness is based upon a broad, general statement of negligence, without any particular description of such negligence, and depending upon the inference of negligence by reason of certain alleged facts, a plaintiff can not prevail in the face of positive, unimpeached testimony to the contrary.

The Circuit Court of Appeals for the Fifth Circuit did not apply this rule of law in the instant case and it fell into error by not so doing.

As pointed out by Judge Sibley, in the dissenting opinion in this case, the District Judge did not pass upon the motion for a new trial, as shown by the opinion of the District Judge. Record pages 215-215. His whole opinion is devoted to the question of the motion for judgment notwithstanding the verdict and the Record shows that the District Judge did not exercise the discretion vested in him by law to pass upon and determine the merits of the motion for a new trial. As pointed out by Judge Sibley, in the dissenting opinion, this case is notable because all four Judges—the District Judge and the Appellate Judges, have thought the verdict wrong but the Trial Judge and a majority of the Appellate Judges hold that there is no remedy.

We submit that there is a remedy, and that is a reversal of the judgment of the Circuit Court of Appeals and of the District Court in order to afford to the petitioner here an opportunity to have its motion for a new trial considered and passed upon by the District Court, if that is the only remedy which can be given; but we submit that that remedy is not the one which should be applied. The remedy should be a reversal of this case for the reason that the record is wholly without any legal support to sustain the verdict and judgment.

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that this Court should grant the petition for a writ of certiorari herein, directing said Honorable Circuit Court of Appeals for the Fifth Circuit to send the record and proceedings in this cause to this Court so that this Court may review

and act thereon as of right and according to law and as ought to be done.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

RAILWAY EXPRESS AGENCY, INC.,
Petitioner,

vs.

GLYNN C. MALLORY,
Respondent

REPLY BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

Respondent was an employee of petitioner at its Natchez, Mississippi, office. He had been employed by petitioner for nine years, but for a period of from two to three years prior to the injury to his back he was employed as cashier and had the duties of keeping records and of shipping money and receipting for money shipments to Natchez, Mississippi. Money shipments were made in burglar and fire proof safes made to lie flat on back and having a door on top. These safes weighed about 360 pounds each and were about 24 inches long, 15 inches wide and 17 inches high. The safe about which respondent complained was numbered 368. It had a handle on one end, but the handle on the other end was missing. Respondent complained that

from the time he took over the duty of shipping the money, over a period of two or three years, the combination or opening mechanism of safe Number 368 would not open while lying on its back. Respondent knew the combination and tried often to open the safe while it was on its back but the door would not open. In order to make the combination work he found it necessary to stand the said safe on its end. In that position he could open the safe. He made frequent complaints to his superior, the agent at Natchez, Mississippi, that the opening mechanism was out of order, that the safe could not be opened without standing it on its end and that the safe was too heavy for one man to lift. The agent had often promised that he would see about it, or do something about it, but nothing was ever done. Finally, a few days before his injury, respondent made a complaint and the agent threatened to replace him if he didn't lift the safe, get the money and quit coming to him with complaints. Respondent was weak with a stomach disorder which was prevalent in Natchez at the time and had requested the agent to get someone to relieve him but the agent did not comply with his request. Fearing that he would be replaced, he made no further request for help and on February 14, 1945, while lifting the said safe up on one end for the purpose of opening it and making a money shipment, he felt a sharp pain in his back and later was found to have a ruptured intervertebral disc with severe injury to the muscles and nerves of his back.

The safe had to be lifted at the end which did not have a handle in order that the combination or dial would be upright so one could read it.

Respondent's testimony was convincing and although the petitioner's agent and four or five other employees denied that the safe was out of order and three witnesses denied that the safe had been repaired, the jury believed respondent's testimony and found by its verdict that petitioner was

negligent in that it failed to use reasonable care to repair the safe so as to make it unnecessary to lift the safe in order to open it, or in failing to use reasonable care to furnish reasonably safe means and methods for respondent to perform his work, or in failing to use reasonable care to furnish a sufficient number of men for necessary lifting.

The Court's charge to the jury was a proper statement of the law applicable in this cause and covered other points in issue as well as the two mentioned and relied on by petitioner. It was a fair statement of the law and petitioner took no exceptions. The Court's charge to the jury is found in the Record, pages 202-207, inclusive.

At the end of the testimony on behalf of respondent, petitioner moved for a directed verdict. The Court overruled the motion saying that it was a question for the jury. See Record 103. At the conclusion of all of the testimony the Court overruled another motion for a directed verdict and submitted the case to the jury on the several points in issue as stated in the Court's charge. After the verdict, petitioner filed a motion for judgment *non obstante veredicto* and in the alternative a motion for a new trial. See Record, 210-212, inclusive.

On August 7, 1947, the Court signed the following order:

> "Came on to be heard the Motion of the Defendant for judgment not withstanding the verdict of the Jury and also the Motion of the Defendant for a new trial and the Court having considered both Motions is of the opinion that same should be overruled.
>
> It is therefore Ordered by the Court that the Motions of the Defendant for Judgment or for a new trial be and the same are both hereby overruled.
>
> Ordered this the 7th day of August, 1947.
>
> (Sgd.) S. C. Mize,
> *U. S. District Judge.*"

See Record, pages 215-216. The opinion of the Court is in the Record on pages 214 and 215. The letter of the Dis-

trict Judge addressed to the attorneys of record is in the Record on pages 213 and 214.

On August 14, 1947, petitioner gave notice of appeal. See Record, page 216.

This case is reported as follows: *Railway Express Agency, Inc.* v. *Mallory*, 168 Fed. 2d 426.

Argument

Petitioner says that the opinion of the Circuit Court of Appeals in this cause is in conflict with the holding of the Supreme Court of the State of Mississippi and cites *Columbus and Greenville Railroad Co.* v. *Coleman*, 172 Miss. 514, in which the Court held that the mere assertion by a witness that something was out of order, or that the instrumentality furnished him by the master would not work, is not sufficient to afford a basis for a recovery against the master. In that case there was no proof of negligence of the master causing or contributing to the injury of the servant. There was no proof that the master had notice of the defect in the coupling between the motor car and the trailer. In this cause, however, the respondent had repeatedly notified the petitioner that there was a defect in the opening mechanism of the safe. The respondent had no way of knowing why the safe would not open while lying on its back. The petitioner had the means of finding the defect and repairing it but negligently failed to do so. In this instance it is foolish to argue that respondent failed to point out what was wrong on the inside of the dial or opening mechanism. Negligence was proved in that the master, after having repeated notice, failed to use reasonable care to remedy the defect and required the servant to continue using the safe in its defective condition, which necessitated lifting it on its end to make the tumblers in the opening mechanism fall in proper place for opening. The dissenting opinion suggested that defec-

tive eyesight might have been the reason why the respondent could not open the safe while lying on its back. No complaint was made by the petitioner that respondent's eyesight was bad. His work was admitted to be satisfactory. He had no trouble in opening any of the other similar safes being used by the petitioner.

We submit that there is no conflict between the holding in this cause and the holding of the Supreme Court of the State of Mississippi in *Columbus and Greenville Railroad Co.* v. *Coleman*, 172 Miss. 514, or in similar cases.

In *Texas Co.* v. *Hood et al.*, 161 Fed. 2d 618, the Circuit Court of Appeals of the Fifth Circuit held that the verdict and judgment was predicated on conjecture alone, based on a pyramiding of inferences which is not permissible under Texas law. That case presents no conflict with the opinion of the Court in this Cause. In this Cause the negligence of the petitioner was proved by the positive, clear and impressive statement of facts by the respondent. There was no necessity of drawing an inference from circumstances. The jury was required to decide the issues on the positive testimony of respondent and the negative testimony of petitioner's witnesses. The credibility of the witnesses was for the jury to determine. Petitioner's witnesses testified that the safe had not been repaired between the time of respondent's injury and the time of the trial. The jury of course, knew that the safe was not in the care of these witnesses at all times, and could have been repaired without their knowledge. The agent may have been biased by the fact that if negligence were admitted or proved he would be in danger of losing his position. The jury was under no legal compulsion to believe these witnesses, and had a right to infer that the safe had been repaired without the knowledge of the witnesses for petitioner.

The opinion of the Circuit Court of Appeals is not in conflict with the decisions of the Supreme Court of the United States as in the case of *Pennsylvania R. Co.* v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819. In that case the Court said:

> "It, of course, is true, generally, that where there is a direct conflict of testimony upon a matter of fact, the question must be left to the jury to determine, without regard to the number of witnesses upon either side. But here there really is no conflict in the testimony as to the facts."

There was a plain conflict of testimony in this case, and therefore it was a proper case for the jury to decide.

Petitioner makes the statement that the testimony of its witness was undisputed, uncontradicted and positive that the safe was in the same condition at the time of trial as at the time of respondent's injury. Their testimony was in direct contradiction with the positive testimony of the respondent. Furthermore, their testimony was of a negative nature, and may have been inspired by their desire to keep in good standing with their employer.

The jury exercised its sound discretion in judging as to the credibility of the witnesses and the weight of the testimony. This the jury had both a right and a duty to do. It is not the function of an appellate court to weigh conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See *Lavender* v. *Kurn,* 327 U. S. 645, 652, 66 S. Ct. 740, 744.

Petitioner states that the decision of the Circuit Court of Appeals is erroneous in that the Circuit Court of Appeals recognizes that the verdict and judgment is erro-

neous but that a majority of the Judges hold that there is no relief. In their opinion the Circuit Court of Appeals said:

> "There was testimony from which the jury would have been amply justified in finding for the defendant Express Company; on the other hand, if the plaintiff's was believed, the jury could find the facts as the plaintiff related them.
>
> While an examination of the record in this case has led to the conclusion that the trial judge might very properly have granted appellant's motion for a new trial, we do not find that he failed to exercise his discretion, nor can we say that his denial of the motion was an abuse of his discretion. In the alternative, the lower Court might properly have required a remittitur, again a matter of discretion. But there are present none of the special circumstances which would subject the action of the Court below to the review of this Court." Record p. 223."

There is no recognition or error, but, rather, of the fact that there was no error apparent in the trial of this Cause. The fact that Judge might have decided the case differently does not render the jury verdict erroneous.

Petitioner states that the decision of the Circuit Court of Appeals is erroneous in that it failed to pass upon the question as to whether the District Judge was in error in not considering and passing upon the motion for a new trial filed by petitioner. The order overruling petitioner's motion specifically states that the Court considered both motions and that the "Motions of the Defendant for Judgment or for a new trial" are overruled (R. 216). The letter of the District Judge, dated August 7, 1947, and filed August 9, 1947, says that he considered the case very carefully and reached the conclusion that the verdict of the jury must stand and that he thinks there was an issue of fact for the jury (R. 215-216).

Respondent's testimony made a clear case for the jury. The jury by its verdict found the testimony of respondent and the witnesses in his behalf to be more worthy of belief than the testimony on behalf of petitioner. The trial Judge held correctly that the testimony for the respondent is sufficient on which to base the verdict of the jury and that in view of the plain contradiction of the testimony for and the testimony against respondent, it was for the jury to decide. The Circuit Court of Appeals was correct in saying that the record shows no error, and that "there are present none of the special circumstances which would subject the action of the Court below to review by this Court."

We submit that it is clear that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES F. ENGLE,
Natchez, Mississippi;
R. M. KELLY,
Vicksburg, Mississippi;
ROSS R. BARNETT,
Jackson, Mississippi,
Counsel for Respondent.

Certificate

I, Ross R. Barnett of Counsel for Respondent, hereby certify that I have this day personally delivered to James L. Byrd of Counsel for Petitioner a copy of the foregoing Answer of Respondent and Reply Brief.

This 20 day of August, 1948.

ROSS R. BARNETT.